In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

ROBERT J. BRADEN,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellee,

vs.

JOHN F. BONISTALL,
Third-Party Defendant-Appellant,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN F. BONISTALL,
Petitioner *Pro Se*
525 Military Road
Zanesville, Ohio 43701

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Third-Party Defendant-Appellant,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioner, John F. Bonistall, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals, for the Sixth Circuit, entered in this proceeding May 21, 1971, affirming the findings of the United States District Court for the Southern District of Ohio, dated July 6, 1970.

JURISDICTION

The findings of the Court of Appeals were entered on May 21, 1971. See Appendix, p. 18. This petition for certiorari was filed less than 90 days from the date afore-

said. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1253, paragraph (4).

STATEMENT OF THE ISSUE PRESENTED

WHETHER the new evidence submitted to the Court of Appeals is sufficient basis for absolving Appellant from personal liability for failure of a corporation to pay withholding taxes, since this new evidence totally discredits those witnesses upon whose testimony the judgment of the Court of Appeals was based.

Personal liability for failure to pay federal withholding taxes is delineated in Title 26, U.S.C.A., Section 6672. The Fifth Circuit, in *U.S.* v. *Hill,* 368 Fed. 2nd 617 (621) stated:

> "There must be a duty, coupled with a willful violation of that duty. (Citation) Moreover, Section 6672 is on its face penal and must be strictly construed."

STATEMENT OF THE CASE

On May 5, 1967, the Internal Revenue Service made penalty assessments, under Section 6672 of the Internal Revenue Code of 1954, against Robert J. Braden (Braden), sole-owner of all corporate-shares, Treasurer and Chairman of the Board of Directors of American Pottery Company, Inc. (American), and John F. Bonistall (Bonistall), former employee and nominal corporate-President of American during the period at issue. The assessments were based upon failure of the corporation to pay-over to the United States Treasury those federal income and social security taxes, in the amount of $23,981.31, withheld from the wages of its employees during the fourth quarter of 1963 and the first two quarters of 1964.

Braden made a partial payment of the assessment in the amount of $116.57. After his subsequent claim for refund

was disallowed by the Internal Revenue Service, Braden instituted suit in the United States District Court, for the Southern District of Ohio, on October 10, 1967. The Government counterclaimed for the balance of the assessment plus statutory interest and, based upon statements made to the Appellate Division by Braden and James M. Roach (Roach) his bookkeeper, interpleaded Bonistall as Third-Party Defendant. The government maintained that Braden and Bonistall were equally liable as responsible officers of the corporation, who willfully failed to pay-over federal income and social security taxes withheld from employees during the quarters at issue.

The District Court entered findings of fact and conclusions of law on July 16, 1970. Judgment was entered in favor of the Government against Bonistall on August 28, 1970, and against Braden on September 10, 1970. Bonistall filed a notice of appeal on September 10, 1970. Jurisdiction was conferred on the Court of Appeals for the Sixth Circuit by 28 U.S.C. Section 1291.

The background of this petition is as follows: In 1958, following the foreclosure of a promissory-note, Braden acquired the land and manufacturing plant of American, an Ohio corporation located in Marietta, Ohio. In 1961 he similarly acquired the corporations' equipment and, on October 2, 1961 became owner of all the corporations' issued and outstanding stock. At the time of the acquisition of the corporate stock, Braden elected himself President and Chairman of the Board. At this point in time, American lacked a satisfactory product-line and employed no field sales force. Terrace Ceramics, Inc. (Terrace) an Ohio corporation located in Zanesville, Ohio, however, was already well-established in the national market as a selling organization specializing in pottery-products, sold through a network of independent commission-salesmen. On May 7, 1962, Braden hired Bonistall as sales manager,

with the nominal corporate-title of President. On the date he was hired, Bonistall was owner of Terrace. Under the terms of the employment agreement (Exhibit 2) the total output of American could be sold through Terrace' sales organization (Tr. 86) and Bonistall was to be in charge of all sales and the design of lines of manufacture.

During the quarters at issue comprising the fourth quarter of 1963 and the first and second quarters of 1964, control of the corporation was administered by Braden and his bookkeeper Roach who supervised fiscal matters (Tr. 68). This included that period from mid-February through mid-May 1964 when Braden was in Las Vegas, Nevada (Tr. 56-57, 117-118). On June 30, 1964 Braden returned from Nevada and summarily called a shareholders/directors meeting for 1:00 P.M. that day. At this meeting Braden terminated Bonistall's employment and attempted to take-over Terrace' market for pottery-products. Bonistall, thereupon, changed the postoffice address of Terrace' from Marietta back to Zanesville (Ohio), and all orders received from Terrace' customers, thereafter, were withheld pending the consummation of a new contract between Terrace and American. On July 21, 1964 the contract was signed and the withheld orders were placed with American for production and shipment to Terrace' customers, since American had no market of it's own (Tr. 131). In effect, however, nothing operational had changed except that Bonistall now had his Terrace sales office in Zanesville, while Braden continued to operate the company; Roach, although now possessing the corporate titles of President and Treasurer, continued to be the bookkeeper.

American continued in business until June 1, 1965 when manufacturing operations ceased. On October 28, 1965, the assets of American were sold at auction for $30,000 by the Internal Revenue Service. After the funds from

the sale were applied, there remained unpaid taxes in the amount of the assessments made against Braden and Bonistall on May 5, 1967. Braden made a payment on the assessment and filed suit for refund. The Government counterclaimed for the balance of the assessment and, following conferences with Braden and Roach, interpleaded Bonistall as the Third-Party Defendant. Judgment was entered for the Government against both Braden and Bonistall. The appeal by Bonistall to the Court of Appeals for the Sixth Circuit followed, and was filed on September 24, 1970. Braden did not appeal the adverse decision.

On May 21, 1971, the Court of Appeals affirmed the judgment of the District Court, citing the testimony of Braden and Roach. On May 28, 1971 Bonistall filed a Petition for Rehearing which was denied on June 24, 1971; a subsequent Suggestion for Rehearing in Banc was denied on July 29, 1971. On July 31, 1971, Bonistall filed Notice of Appeal to the Supreme Court of the United States. This Petition then followed.

REASONS FOR GRANTING THE WRIT

Pertinent material containing important new evidence, that should have been presented to the District Court, was subsequently submitted to the Court of Appeals. This new evidence totally discredits the testimony of those witnesses upon whose word both the District Court and the Court of Appeals relied, in making their judgments. Excerpts from this material are presented herewith for evaluation:

1. During the Trial, it was shown that the law firm representing the corporation was also personal legal counsel to Braden (Tr. 51-52). This law firm created the corporate minutes, describing meetings which never took place, but which are recorded in the Minutes Book. A

review of these minutes reveals a practice, by Braden, of deliberately appointing employees to corporate office and directorship, for the purpose of investing them with responsibility for corporate actions over which they would have no control. Witness the appointment of Mary Satterfield, clerk-typist and former sales-secretary, as corporate officer and director subsequently countersigning hundreds of checks on the Regular Account but who has disclaimed, in direct testimony, any knowledge of the corporations' finances (Tr. 107, 111). Witness the "election" of James M. Roach as President, Treasurer, and Director but whose actual role continued to be that of bookkeeper until the Company ceased operations, and he has so testified (Tr. 69), but whose handwritten signature appears on all checks of the Regular Account (Exhibit G).

2. After July 1, 1964 when Bonistall was terminated, until December 31, 1964, all checks drawn on the Regular Account were countersigned by Braden (Tr. 85). Beginning January 1st through June of 1965, however, all such checks were countersigned by Mary Satterfield, instead of Braden. And it was during this latter period that the American Pottery Company became further delinquent in the payment of withholding taxes, adding to the quarters at issue the months of March, April, May and June of 1965 (Tr. 76-77). Yet, when the pottery was seized and sold back to Braden for $30,000, the proceeds of that public-sale were applied to pay these newer 1965 tax deficiencies in full, with the remaining monies applied against the tax deficiencies for the quarters at issue. At this point in time, both Roach and Mary Satterfield could have been denounced as the "responsible officers" who signed and countersigned all corporate checks during the last six months of the companys' operation. And Braden could have accused them, instead of Bonistall, of "willfully" paying the company's creditors, with monies that

should have been used for paying the tax deficiencies for the quarters at issue, if they became rash enough to relate the truth of this matter to personnel of the Internal Revenue Service.

3. It has been shown by the testimony (Tr. 56-57, 117-118, 141), as well as extensive exhibits (Exhibits F, 3-A), that Braden continued to control the company, as well as other Braden owned/controlled enterprises even while in Nevada (Tr. 39-40). This personal management in absentia was based on information furnished Braden, by Roach, and consisted of handwritten correspondence plus comprehensive "Daily Reports" showing departmental costs, amount of daily factory payroll, number of employees present, orders received, units manufactured, dollar-value of daily production, and the dollar-value of daily shipments from the pottery. Given these circumstances, it is difficult to believe that Roach would not inform Braden that the delinquent withholding taxes were not being paid if Bonistall, in fact, had been given $26,000 to pay them, as alleged by Braden, but had willfully refused to do so. Nevertheless, Braden has testified that he received no information whatsoever, from Roach, that the taxes were not being paid (Tr. 28).

4. Statements by Braden in 1965, to agents of the Internal Revenue Service, that he handed a check in the amount of $26,000 to Bonistall, just before departing for Nevada, with instructions to use these funds for the payment of withholding taxes then due, had the direct result of Bonistall being interpleaded as Third-Party Defendant in this litigation. On Pages 19 and 20 of Braden's deposition, taken September 17, 1968, this lie is repeated:

By Mr. Csontos (for the United States of America)

Q. "Now, did you discuss with Mr. Roach the Social Security and Withholding Taxes of the American

Pottery Company at any point in time while you were associated with the corporation?

A. I don't recall that I did personally. He came to me and told me that the taxes were due in the latter part of January 1964, that we were behind with our payments. Something had to be done about it. And, of course, he knew I was leaving Ohio, and I got the money to pay the taxes.

Q. And how much was that, sir?

A. $26,000.

Q. And what did you do with the $26,000?

A. Gave it to Mr. Bonistall."

Referring to Page 24 of the Trial Transcript, however, we now find Braden testifying that, rather than handing a check for $26,000 to Bonistall, he actually deposited four checks (the first on January 4th and the last on February 8th) into the checking account of the pottery to pay taxes, he says, that were then due and owing. It is shown on Page 32 of the Trial Transcript, however, that at the time these deposits totalling $26,000 were made; the taxes then owing by the corporation were less than $5,300. Moreover, in the ANSWERS OF PLAINTIFF TO INTERROGATORIES SUBMITTED BY DEFENDANT UNITED STATES OF AMERICA we find, under Interrogatory No. 25, the following:

Q. "Did the Company, during the periods involved, have sufficient funds to pay withholding and FICA taxes withheld from employees' wages?

A. (By Braden) As the result of Bonistall having used the withheld funds for payment of other bills rather than the payment of taxes for which they were withheld, the Company could not pay the taxes. It was then that I had to borrow $26,000 personally to advance to the Company for this purpose, as stated above."

5. It is apparent, from the foregoing, that Braden was intent upon injuring Bonistall because Bonistall had frustrated his attempt to take-over the pottery-market of Terrace Ceramics, Inc. The main legal weapon he selected, however, appears to have been the Corporate Minutes Book. Witness this exchange, from Page 39, of Braden's deposition:

> By Mr. Csontos:
>
> Q. "Now, how about with respect to documents, Mr. Braden, can you think of any documents that would substantiate or would describe your function with the corporation other than the ones we have looked at this morning?
>
> A. I don't have any documents. All you would have to have would be the Minutes Book which would tell — No, I can't think of any documents . . ."

Then, there are the corporate minutes for the Shareholders and Directors Meeting allegedly convened August 23, 1962. No meeting was ever held on that date but these Minutes were, nevertheless, created by Braden's legal counsel and duly placed in the Corporate Minutes Book. They are invalid, even so, since they have not been attested-to and Braden has admitted tampering with them. Yet, they are the basis of Braden's allegation that Bonistall was "general manager" of the pottery. The record is replete with similar lies by Braden in his efforts to denounce a former-employee as guilty of paying bills instead of taxes, owed by his wholly-owned company. The fact that Braden continued to pay such bills, instead of taxes, long after he had terminated the former employee, seems to have been overlooked by both the District Court as well as the Court of Appeals.

6. As to the hiring of Mary Satterfield, we find this subject discussed on Page 7, of Roach's deposition taken September 17, 1968:

By Mr. Csontos:

Q. "Was Mrs. Satterfield with the corporation at the time you came with it?
A. No, she was not.
Q. She was hired at some subsequent time?
A. Yes.
Q. And who hired her?
A. I believe she was hired in response to an ad for a secretary. And she was interviewed both by me and Mr. Bonistall.
Q. Whose decision was it that she should be hired?
A. Well, I would say it would have been a mutual decision. We discussed it."

This last statement by Roach totally discredits any allegation that Bonistall had management/control of the company regardless of his corporate title. Certainly, if Bonistall were running the company, no "mutual decision" with the bookkeeper would be necessary to hire a sales secretary (Tr. 111). But control of all funds was so tight that any action involving the expenditure of company-funds had to be approved by Roach, who has admitted supervising all fiscal matters. Moreover, a close examination of all testimony by Roach reveals that, at no time, did he ever charge Bonistall with specifically instructing him to use withheld taxes for payment of company-creditors (Tr. 73). Certainly, if Roach had been so instructed he would have said so. Furthermore, when one considers that the quarters at issue span a period of nine (9) months, it is difficult to believe that Roach would not ask Bonistall for specific instructions concerning the unpaid taxes unless Bonistall had no authority, whatsoever, over the expenditure of company-funds. Given these circumstances, the allegation by Braden, that Bonistall "willfully" refused to pay these taxes is without basis.

7. Finally, it should be pointed-up, in reply to comments on Page 3 of the findings of the Court of Appeals

in this action (App. p. 20), that it is irrelevant whether or not Bonistall was aware of the corporate obligation to withhold and pay-over federal income and social security taxes. Aside from the discredited testimony of Braden and Roach, there is no evidence to show that Bonistall had any knowledge of these unpaid taxes. In fact, the record indicates (Exhibit D) that the Quarterly Tax Returns for these delinquent taxes were neither computed nor filed until *after* Bonistall's employment at American had been terminated by Braden, and Roach named President and Treasurer of the corporation. (Tr. 75).

CONCLUSION

For the foregoing reasons, which underscore the vindictive and malicious use of due-process by Braden, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

JOHN F. BONISTALL
Petitioner *Pro Se*

John F. Bonistall
525 Military Road
Zanesville, Ohio, 43701

APPENDIX

In The

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

ROBERT J. BRADEN,
Plaintiff,

UNITED STATES OF AMERICA,
Defendant-Appellee,

vs.

JOHN F. BONISTALL,
Third-Party Defendant
Appellant.

No. 20,821

NOTICE OF APPEAL

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that John F. Bonistall, the Appellant in the above-styled cause, hereby appeals to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Sixth Circuit dated May 21, 1971 (rehearings denied on May

28, 1971 and July 29, 1971) affirming the determination of the United States District Court for the Southern District of Ohio, dated July 16, 1970. This appeal is taken pursuant to 28 U.S.C., Section 1253, paragraph (4).

/s/ JOHN F. BONISTALL
Appellant
525 Military Road
Zanesville, Ohio 43701

July 31, 1971

AFFIDAVIT OF SERVICE

I, John F. Bonistall, Appellant herein, hereby certify that, on the thirty-first (31st) day of July 1971, copies of the attached Notice of Appeal to the Supreme Court of the United States were served, via United States Certified Mail, postage prepaid, to the following:

James A. Higgins, Clerk
UNITED STATES COURT OF APPEALS
For the Sixth Circuit
Cincinnati, Ohio 45202

Mr. William W. Milligan
United States Attorney
302 New Federal Building
Columbus, Ohio 43215

Johnnie M. Walters
ASSISTANT ATTORNEY GENERAL
Department of Justice
Washington, D.C. 20530

Mr. John C. Graham
Counsel for Plaintiff
Graham & Graham
Zanesville, Ohio 43701

It is further certified that all parties required to be served, have been served via United States Certified Mail, postage prepaid.

/s/ JOHN F. BONISTALL
Appellant

Subscribed and sworn-to before me at Muskingum County, Zanesville, Ohio on this 31 day of July, 1971.

/s/ JAMES R. VAN SANT
Notary Public
Muskingum County, Ohio
My Commission Expires Oct. 27, 1973

No. 20,821

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

ROBERT J. BRADEN,
Plaintiff,

UNITED STATES OF AMERICA,
Defendant-Appellee,

vs.

JOHN F. BONISTALL,
Third-Party Defendant,
Appellant-Petitioner.

ORDER

(Filed July 29, 1971)

Before: CELEBREZZE and KENT, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

On consideration of the Appellant's suggestion of rehearing in banc, no Judge of this Court having moved for rehearing in banc, and the panel which heard the case having already denied Appellant's petition for rehearing filed May 28, 1971, rehearing in banc is denied.

ENTERED BY ORDER OF THE COURT

/s/ JAMES A. HIGGINS
Clerk

No. 20,821

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

ROBERT J. BRADEN,
Plaintiff,

UNITED STATES OF AMERICA,
Defendant-Appellee,

vs.

JOHN F. BONISTALL,
Third-Party Defendant,
Appellant-Petitioner.

ORDER

(Filed June 24, 1971)

Before: CELEBREZZE and KENT, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

Upon due consideration, it is ORDERED that Appellant's petition for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ JAMES A. HIGGINS
Clerk

No. 20,821

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

ROBERT J. BRADEN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee,

vs.

JOHN F. BONISTALL,

Third-Party Defendant,
Appellant-Petitioner.

Appeal from the United States District Court for the Southern District of Ohio.

(Filed May 21, 1971)

Before: CELEBREZZE and KENT, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

PER CURIAM. This action was instituted by Robert J. Braden, the sole owner of a corporation, against the United States to recover amounts paid on a penalty assessed against him for failure to pay over to the United States federal income and social security taxes withheld from the wages of the corporation's employees, in violation of Section 6672 of the Internal Revenue Code of 1954, 26 U.S.C. § 6672 (1964). The Government interpleaded the Appellant, an

officer of the corporation during all relevant periods, as a third-party defendant, alleging that he was equally liable, with Braden, for the penalty. The case was tried without a jury; the District Court held in favor of the Government and entered judgment against Braden and the Appellant. Braden has not appeal the adverse decision; the Appellant has. The sole issue he raises is whether there is sufficient evidence on the whole record to support the District Court's findings.

Section 6672 of the Internal Revenue Code of 1954 provides that any person who is responsible for the collection and payment over of any tax, who "willfully" fails to collect or pay such tax, is liable for a penalty equal to the amount of the unpaid tax.

There is no dispute that during the periods relevant to this case, federal income and social security taxes which had been withheld from the wages of the corporation's employees were not paid over to the United States Treasury. There is a direct conflict in the testimony, however, concerning whether the Appellant was responsible for the payment of the taxes and, if he was, whether his nonpayment was "willful."

Concerning the issue of responsibility for payment, Braden testified that, during the relevant periods, the Appellant was "president and general manager" of the corporation and that "he had the duty, complete duties to take care of everything or see that it was done." By Braden's account, the Appellant had plenary responsibility of all corporate affairs, including the payment of creditors and the power to prefer one over another. The Appellant testified, however, and argues on appeal that he was hired merely as a "general *sales* manager" with authority merely in product development and marketing. The District Court credited the testimony of Braden and discredited the Appellant's. We cannot say that this credibility de-

termination was improper or incorrect. Rule 52 (a), Federal Rules of Civil Procedure. Furthermore, the existence of the same duty and concomitant responsibility in Braden did not relieve the Appellant of his responsibility. *See Monday* v. *United States,* 421 F.2d 1210, 1214 (7th Cir. 1970), *cert. denied,* 39 U.S.L.W. 3146 (U.S., Oct. 13, 1970) (No. 194).

The next conflict in the testimony was over whether the Appellant knew of the deficiencies and intentionally failed to pay them. If the Appellant was aware of the fact that the taxes were unpaid, and, possessing the power and responsibility to pay them, failed to do so, then he is liable for the penalty of section 6672 notwithstanding his lack of malice or wrongful purpose. *Monday* v. *United States, supra,* 421 F.2d *at* 1215-17; *Dudley* v. *United States,* 428 F.2d 1196, 1198 (9th Cir. 1970); *Pacific National Insurance Company* v. *United States,* 422 F.2d 26, 33 (9th Cir. 1970), *cert. denied,* 398 U.S. 937. Not only did the Appellant admit that, from his prior business experiences, he was aware of the corporate obligation to withhold and pay over federal income and social security taxes, but the testimony of Roach and Braden establishes that he was aware that said taxes were due, owing, and unpaid, and that, with this knowledge, he preferred other creditors over the United States. This testimony appears in the record of the case, and we cannot say that the District Court was clearly in error in crediting it. Rule 52 (a), Federal Rules of Civil Procedure.

The judgment of the District Court is affirmed.

In The
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Civil Action No. 67-320

ROBERT J. BRADEN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant,

vs.

JOHN F. BONISTALL,

Third Party Defendant.

JUDGMENT

(Filed September 10, 1970)

This action came for trial before the Court, Honorable Carl A. Weinman, United States District Judge presiding, and the issues having been fully tried and the Court having duly rendered its decision,

It is Ordered and Adjudged,

that plaintiff, Robert J. Braden, take nothing and that the complaint be dismissed on the merits; that defendant, United States of America, recover of the plaintiff the sum of $7,297.82 with interest thereon at six percent per annum from May 5, 1967, and interest of six percent per annum from May 5, 1967 on the following amounts to the following dates:

	Amount	Date
(1)	$ 116.57	July 18, 1967
(2)	838.83	November 20, 1967
(3)	11,874.08	January 2, 1968
(4)	1,556.11	April 15, 1969
(5)	2,297.90	April 15, 1970

and that defendant recover of the plaintiff its costs of this action.

Dated at ....., Ohio this ..... day of ....., 1970.

/s/ CARL A. WEINMAN
Chief Judge
United States District Court
Southern District of Ohio

In The
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Civil Action No. 67-320

ROBERT J. BRADEN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant,

vs.

JOHN F. BONISTALL,

Third Party Defendant.

JUDGMENT

(Filed August 20, 1970)

This action came for trial before the Court, Honorable Carl A. Weinman, United States District Judge presiding, and the issues having been fully tried and the Court having rendered its decision,

It is Ordered and Adjudged,

that third party plaintiff, United States of America, recover of the third party defendant, John F. Bonistall, the sum of $7,297.82 with interest thereon from May 5, 1967 and interest of six percent per annum from May 5, 1967 on the following amounts to the following dates:

	Amount	Date
(1)	$ 116.57	July 18, 1967
(2)	838.83	November 20, 1967
(3)	11,874.08	January 2, 1968
(4)	1,556.11	April 15, 1969
(5)	2,297.90	April 15, 1970

and that third party plaintiff recover of the third party defendant its costs of this action.

Dated at Dayton, Ohio, this 27th day of August, 1970.

/s/ CARL A. WEINMAN
Chief Judge
United States District Court
Southern District of Ohio

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Civil Action No. 67-320

ROBERT J. BRADEN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant,

vs.

JOHN F. BONISTALL,

Third Party Defendant.

FINDINGS OF FACT
CONCLUSIONS OF LAW

(Filed July 16, 1970)

This case against Robert J. Braden and John F. Bonistall pertains to the personal liability of a corporate officer for the corporation's failure to pay federal taxes withheld from its employees for income taxes and Social Security taxes. *Section 6672, I.R.C. (Title 26, U.S.C.A., Section 6672)* imposes such liability on a corporate officer who is responsible for the collection and payment of such taxes and who willfully fails to cause such taxes to be paid.

FINDINGS OF FACT

1. The American Pottery Company was formed in

1942. It was located at Marietta, Ohio and engaged in the manufacture and sale of pottery and related products.

2. In 1958 Robert J. Braden purchased from the company the land and plant utilized for the manufacture of pottery. In 1961 he purchased the company's equipment and on October 2, 1961 Braden acquired all of its issued and outstanding stock. Upon purchase of the stock Braden was elected Chairman and President of the Board and Klipple was elected General Manager.

3. On May 7, 1962, Braden hired John F. Bonistall as president and general manager of American Pottery Company. Bonistall on the date he was hired by Braden was president, general manager, and sole shareholder of Terrace Ceramics, Inc., a corporation engaged in the marketing of pottery and related products nationally.

4. The May 7, 1962, agreement provided that Bonistall would be added to the board of directors of American Pottery Company; that Braden would resign as president; that Bonistall would be elected president; that his salary would be $1,500 a month; that his principal duty would be all sales and general management policy as to lines of manufacture; and that he could market all products of the American Pottery Company through Terrace Ceramics, Inc. At a meeting of the shareholders and directors of the company held on August 23, 1962, Braden resigned as president and Bonistall was named president, a director, and general manager of the corporation. When Bonistall assumed the duties as director, president and general manager the previous general manager Klipple left the employ of the company.

5. The company maintained three checking accounts — a payroll account, a treasurer's account and the regular account. The payroll account was utilized for paying all other bills, including taxes. Bonistall was the only person authorized to sign the payroll checks and treasurer's

checks could be signed by either Bonistall or Braden. The regular checking account required two signatures and Braden, Bonistall and Roach were authorized to sign checks on that account. During the quarters in issue (the last quarter of 1963 and the first two quarters of 1964) most of the checks drawn on the regular account were signed by Bonistall and Roach, with Braden signing checks only when Bonistall was out of town or otherwise unavailable. After Bonistall left the company, for several months Braden signed all of the checks written on the regular account.

6. From May, 1962 until July 1, 1964 *Bonistall* as president and general manager had complete control of the corporation. The evidence is clear in this respect according to the testimony of Braden and Roach; also agreements and letters to Mr. Goodfriend in connection with the securing of a loan. He hired and fired administrative and supervisory personnel; assisted in negotiating factoring arrangement with Walter Heller & Company; appointed himself also as plant manager; had authority to sign checks for the payment of employees, taxes and other creditors. Because of his prior business experience with this company he was aware of the corporate obligation to withhold taxes and to pay over those taxes to the United States. Bonistall further was responsible in determining which creditors would be paid.

7. The period in issue from October 1, 1963 to June 30, 1964 *Braden* was treasurer and chairman of the board of the company. As treasurer he was in charge of all money, bills, notes, bonds and similar properties of the corporation and was authorized to sign all checks and keep such financial accounts as might be required. He financed the operations of the corporation, making substantial advances to it. The amounts payable Braden were as follows:

1961	$ 73,000.00
1962	306,038.30
1963	423,038.30
1964	470,312.20

Braden did not work for the company on a full time basis but visited the premises on an average of three times a week for approximately two hours per visit and sometimes discussed the company's finances with the officers. Braden furnished the money when the corporation needed funds and was the person that decided that American Pottery Company would factor its accounts receivable through Walter Heller & Company and negotiated the financing agreement with that firm. He engaged in negotiations with William Goodfriend concerning a loan to the corporation and at all relevant times had the authority to sign checks on the regular and treasurer's checking accounts. He exercised control over the corporation in other areas such as hiring an efficiency expert, designing and remodeling the production line and shipping area, making the decisions concerning construction of these improvements, spending considerable time at the plant in connection with the efforts to automate, kept abreast of the corporation's operations through reports which were mailed to him when he was in Nevada, directed that the corporation make certain payments to Grindley, slowed down production when sales were unable to stay ahead of production, and fired Bonistall and appointed a new president and general manager.

8. Subsequent to July 1, 1964, the date on which Bonistall was fired, Braden spent more time at the company's office and on a more regular basis than prior to his Nevada trip. For several months thereafter, all of the checks issued on the regular checking account were signed by him. Corporate bills were paid in the same fashion as

when Bonistall was president, except Braden assumed the duties previously performed by Bonistall. Thus, every week to ten days Roach gave Braden the invoices and bills to be paid and Braden directed that some of the bills be paid immediately and that payment on the others be deferred. In addition, when suppliers contacted Braden in an effort to receive payment, he promised to pay them as soon as possible and directed Roach to pay these accounts as soon as the corporation had funds. Braden rehired Grindley who was made vice president and a director, and Braden's son-in-law, Frank Crumbly, was elected to the board of directors and appointed assistant to the vice president. Moreover, accounts receivable of the corporation were factored through Braden Drilling Company, a proprietorship owned and operated by Braden.

9. Roach, Braden and Bonistall discussed the fact in November and December, 1963 that the company did not have sufficient funds to pay the withholding and social security taxes. Braden advanced to the corporation the funds needed to pay the taxes but they were not paid for the fourth quarter of 1963 and neither were the returns for the next three quarters filed with remittance, showing the following liabilities:

4th quarter of 1963	$ 9,404.08
1st quarter of 1964	13,630.53
2nd quarter of 1964	10,039.33

The company continued to meet its payroll until business operations were terminated in May or June, 1965. The taxes withheld from the wages were placed in a general account and not in an escrow account.

While Bonistall was president and while Braden was president the company had sufficient funds to pay the taxes withheld if either had chosen to do so.

10. On October 28, 1965, the assets of American Pot-

tery Company were sold by the Internal Revenue Service at auction for $30,000.00 and the money was properly applied against unpaid withholding taxes, accrued interest and penalties resulting in the penalty imposed by Section 6672 of the Internal Revenue Code of 1954 in the following amounts:

4th quarter of 1963	$ 5,277.15
1st quarter of 1964	10,853.52
2d quarter of 1964	7,850.64
	$23,981.31

Braden has made payments totalling $11,990.65 and seeks a refund of $116.57. Bonistall has made no payments on this assessment.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6671. RULES FOR APPLICATION OF ASSESSABLE PENALTIES.

(a) Penalty Assessed as Tax. — The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary or his delegate, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) Person Defined. — The term "person," as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

SEC. 6672. FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO EVADE OR DEFEAT TAX.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for any pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

SEC. 7501. LIABILITY FOR TAXES WITHHELD OR COLLECTED.

(a) General Rule. — Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

Section 3102 of the Internal Revenue Code of 1954 requires an employer to withhold social security taxes (F.I.C.A.) imposed on its employees and Section 3402 (a) of the Code requires the withholding of income taxes from the wages of employees. *The taxes which must be collected or withheld are to be held as a special trust fund for the United States pursuant to Section 7501 of the Code,* supra. An officer or employee of a corporation, who is under a duty to collect and pay over taxes withheld from the wages of employees and willfully fails to do so, is liable for the

total amount of tax not paid over by reason of Section 6672 of the Code, supra. Although denominated a penalty, the liability imposed by Section 6672 is not penal, but is merely a means of ensuring that the taxes will be paid by shifting the responsibility for payment from the corporation to the person responsible for the nonpayment. *Botta* v. *Scanlon,* 314 F.2d 392 (C.A. 2, 1963); *Spivak* v. *United States,* 370 F.2d 612 (C.A. 2, 1967); *United States* v. *Graham,* 309 F.2d 210 (C.A. 9, 1962).

1. Plaintiff and Third-Party Defendant were responsible officers of American Pottery Company.

The issue of which corporate officers are responsible for the payment of taxes withheld from the wages of employees was recently before the Court of Appeals for the Seventh Circuit in *Monday* v. *United States,* 421 F.2d 1210, (Jan. 29, 1970). The Court stated:

> "Corporate office does not, per se, impose the duty to collect, account for and pay over the withheld taxes. On the other hand, an officer may have such a duty even though he is not the disbursing officer * * * The existence of the same duty and concomitant liability in another official likewise has no effect on the taxpayer's responsibility. * * * Liability attaches to those with power and responsibility within the corporate structure for seeing that the taxes withheld from various sources are remitted to the Government. * * * This duty is generally found in high corporate officials charged with general control over corporate business affairs who participate in decisions concerning payment of creditors and disbursal of funds. * * *"

Among the specific facts which courts have relied upon in determining whether individuals were persons responsible for the payment of taxes withheld from the wages of employees are:

(1) The duties of the officer as outlined by the

corporate by-laws. *United States* v. *Strebler,* 313 F.2d 402 (C.A. 8, 1963).

(2) The ability of the individual to sign checks of the corporation. *Strebler, supra; Schweitzer* v. *United States,* 193 F. Supp. 309 (Neb., 1961).

(3) The identity of the officers, directors and shareholders of the corporation. *Frazier* v. *United States,* 304 F.2d 528 (C.A. 5 1962); *Scherer* v. *United States,* 228 F. Supp. 168 (Idaho, 1963).

(4) The identity of the individuals who hired and fired employees. *Hair* v. *United States,* 64-1 U.S.T.C., par. 9206 (S.D. Calif., Dec. 30, 1963).

(5) The identity of the individuals who were in control of the financial affairs of the corporation. *Horwitz* v. *United States,* 339 F.2d 877 (C.A. 2, 1965); *Flan* v. *United States,* 326 F.2d 356 (C.A. 7, 1964).

More than one person can be a responsible officer of a corporation. *Monday, supra.* It is clear that both Braden and Bonistall were responsible officers of American Pottery Company since both had the duty and authority to see that creditors, including the United States, were paid. *Monday* v. *United States, supra.*

2. Plaintiff and Third-Party defendant wilfully failed to pay the taxes withheld from the wages of employees.

The term "willfully" as used in the statute has been defined by numerous court decisions. The recent decision of *Monday* v. *United States, supra,* defined the term as follows:

> The precise content to be given the concept of "willfulness" varies according to the legal context in which it appears. In criminal statutes, "willfulness" generally requires bad purpose or the absence of any justifiable excuse. United States v. Murdock * * *,

290 U.S. 389, 394. In civil actions, however, these elements need not be present. Rather, willful conduct denotes intentional, knowing and voluntary acts. It may also indicate a reckless disregard for obvious or known risks.

Despite its denomination as a "penalty" assessment, the statutory liability imposed by Section 6672 is essentially civil in nature. Cash v. Campbell * * *, 346 F.2d 670, 673 (5th Cir. 1965). Its basic purpose is the protection of governmental revenue. Botta v. Scanlon * * *, 314 F.2d 392, 393 (2d Cir. 1963); Spivak v. United States * * *, 370 F.2d 612, 616 (2d Cir. 1967), certiorari denied, 387 U.S. 908. It provides a remedy to prevent the unnecessary loss of tax funds by permitting the "tax authority to reach those responsible for the corporation's failure to pay the taxes which are owing." United States v. Graham * * *, 309 F.2d 210, 212 (9th Cir. 1962); White v. United States * * *, 372 F.2d 513, 516 (Ct. Cl. 1967). In light of this purpose, we agree with those courts which have defined willful action under Section 6672 as referring to voluntary, conscious and intentional — as opposed to accidental — decisions not to remit funds properly withheld to the Government. Spivak v. United States * * *, 370 F.2d 612, 615 (2d Cir. 1967), certiorari denied, 387 U.S. 908; Cross v. United States * * *, 311 F.2d 90, 94 (4th Cir. 1962); Hewitt v. United States * * *, 377 F.2d 921, 924 (5th Cir. 1967); Flan v. United States * * *, 326 F.2d 356, 358 (7th Cir. 1964); Bloom v. United States * * *, 272 F.2d 215, 223 (9th Cir. 1959), certiorari denied, 363 U.S. 803; Scott v. United States * * *, 354 F.2d 292, 295 (Ct. Cl. 1965). Liability does not depend upon the presence of bad motive or the specific intent to defraud the Government or deprive it of revenue. White v. United States * * *, 372 F.2d 513, 521 (Ct. Cl. 1967).

In *Bloom* v. *United States*, 272 F. 2d 215 (C.A. 9 1960), the taxpayer was the president and virtually the sole share-

holder of the corporation. As a responsible officer of the corporation, he decided not to pay over to the United States the taxes withheld from the employees' wages, but rather to utilize the funds to pay other creditors. The court viewed such conduct as willful.

The books and records of American Pottery Company and its cancelled checks demonstrate that the corporation had sufficient funds to pay the withheld taxes to the Government, but that the funds were paid instead to other creditors. This was also admitted by Roach, the office manager. The funds were sufficient both while Bonistall was president and general manager and after he was fired when Braden took a more active interest in the business.

In late 1963, Braden, Bonistall and Roach discussed the fact that the company did not have sufficient funds to pay to the Government the taxes withheld from employees' wages. Subsequently, Braden provided funds to the corporation. Despite the availability of these funds, Bonistall failed to see that the taxes were paid and knowing that the taxes were unpaid, continued to sign checks preferring other creditors over the United States. This constitutes willfulness within the meaning of the statute, as interpreted by the courts.

After Braden learned that the taxes had not been paid, he signed checks and determined which creditors should be paid, while the company continued to operate for almost an entire year, always seeing that its payroll was made.

Braden's fiduciary duty to see that the taxes were paid was a continuing one which never ended since the taxes were never paid by the corporation. Despite this duty, Braden was more interested in attempting to protect his investment in American Pottery Company than in having the corporation pay the tax deficiencies. However, as the court stated in *United States* v. *Hill*, 368 F.2d 617 (C.A. 5, 1966):

> The desire to continue in business is not justification for violating the trust imposed by law to pay taxes.

All of the money available was used to keep the business going rather than to pay the taxes. Using the trust funds to pay the current expenses of the business cannot be condoned, *Carroll* v. *United States, supra.*

CONCLUSIONS OF LAW

Robert Braden and John F. Bonistall, officers and directors of the American Pottery Company, at the time in question were responsible officers of said corporation and willfully failed to pay taxes withheld from the wages of employees.

The government shall prepare a judgment entry setting forth that plaintiff's complaint be dismissed and judgment entered against Braden and Bonistall for the amount owing to the United States Government.

/s/ CARL A. WEINMAN
Chief Judge U. S. District Court